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New York State 2019-2020 Employment Law Roundup

It's Time for NY Employers to Update Employee Handbooks

1. *Effective April 2019: Paid Voting Leave*

In April 2019, New York's Election Law Section 3-110 was amended to require employers to offer a minimum of three hours' paid voting leave for employees and post a notice regarding employees' rights. Previously, employees had up to two hours and only in situations where they did not have sufficient time to vote outside of working hours. Employers should update their voting leave policies and notices.

2. *Effective August 12, 2019: New York State Human Rights Law, including sexual harassment prevention, expanded*

As you may recall, on August 12th, Governor Cuomo signed into law expanded protections under New York State Human Rights Law (NYSHRL), so that the law is now to be liberally construed, without reference to any federal law that may lead to a more restrictive result. A number of those expanded protections **took effect October 11, 2019.**

3. *Effective October 11, 2019 (for claims arising on or after this date): The legal expansions to NYSHRL noted above also include:*

- *New Notice Requirements:* All employers in New York State must provide a written sexual harassment prevention notice at the time of employee hire and during annual sexual harassment prevention training. This notice must contain: 1) the sexual harassment policy and 2) the information presented at the sexual harassment prevention training. The notice, policy and training information must be provided in English and in an employee's primary language if it is Spanish, Chinese, Korean, Polish, Russian, Haitian-Creole, Bengali, or Italian.

- *Non-Disclosure Restrictions*: New York State previously imposed restrictions on nondisclosure provisions in agreements settling sexual harassment claims to ensure that confidentiality was the employee's preference. Effective October 11, 2019, the law has been expanded to apply to agreements relating to all kinds of workplace discrimination claims, not just sexual harassment. Specifically, settlements of employment discrimination claims can only include the conditions of confidentiality if it is the complainant's preference and agreements regarding nondisclosure must be "in writing to all parties in plain English, and, if applicable, the primary language of the complainant."

- *Expanded Protections against Unlawful Harassment*:

    - Non-employees working in the workplace are protected from all types of workplace discrimination (not just sexual harassment). The protections extend to contractors, subcontractors, vendors, consultants, "gig" workers, temporary employees, or others providing services in the workplace.

    - NYSHRL now explicitly includes protection in employment from harassment based on any protected class. In addition, domestic workers are now also protected from harassment on all bases.

    - Harassment is against the law whenever an individual in a legally protected category is subjected to inferior terms, conditions or privileges of employment; the conduct need not be "severe or pervasive" for an employer to be liable; it is actionable if it rises to the level of something more than a "petty slight or trivial inconvenience"—essentially adopting the definition used under New York City's Human Rights Law.

    - To establish liability, the complainant does not have to identify a similarly situated person/employee that was treated more favorably.

    - A complainant does not have to complain to their employer or file a formal grievance in order to establish liability.

    - Punitive damages may be awarded against private employers and attorney's fees may be awarded in all employment cases.

4. *Effective October 8, 2019: It's Time for a Pay Equity Self-Audit*

All employers in New York State—regardless of size—must ensure their workers receive equal pay for "substantially similar work," regardless of the worker's legally protected status. Under New York's Pay Equity Law, job applicants, employees, and interns may not be paid a lesser wage then their counterparts based on their age, race, gender, gender identity, sexual orientation, ethnicity or any other legally protected status. Pay differentials will be permitted when based on a seniority or merit system, differences in geographic location, a system measuring earnings by quantity or quality of production, or a "bona fide factor" other than the individual's protected status that is job-related and consistent with business necessity.

New York's Pay Equity Law now potentially makes it easier for employees to show pay differentials against an employee who is not performing the same job. The prior law

required only that employers ensure equal pay for *equal* work and strictly based on gender. A successful plaintiff may recover treble damages under the law.

What Should Employers Do Now? Conduct a pay equity audit of all employees across your organization to ensure that no one in a legally protected class is paid a wage at a rate less than the rate of another employee outside of that protected class where the employees are doing "substantially similar work" to one another. Do not limit yourself to comparing pay of those in the same *job titles*. Rather, review job descriptions and performance evaluations to help determine whether two or more employees are performing "substantially similar work."

Ideally, employers will conduct a pay equity analysis under the guidance and direction of their legal counsel to preserve any claim of privilege (i.e., shield from discovery in the event of an unpaid wage lawsuit) in doing so. And update those job descriptions before you do the audit so you know that you are comparing "apples to apples." Also review job titles to ensure titles match the duties and that differing titles have not been assigned for "substantially similar work."

5. *Effective September 2019: New NYC Guidance on Immigration Status Discrimination*

The New York City Commission on Human Rights (NYCCHR) issued guidance on discrimination based on immigration status and national origin. Discrimination on the basis of perceived or actual immigration status and national origin is unlawful under the New York City Human Rights Law.

As you know, under federal law (IRCA), employers may not knowingly hire or employ individuals not authorized to work lawfully in the United States. Federal law also allows employers to prefer to hire a U.S. citizen or national over a noncitizen where two candidates are "equally qualified" but only after fully considering all other applicants. However, as per NYCCHR guidance, "outside of this limited circumstance, it is a violation of the NYCHRL for employers to discriminate among work-authorized individuals—including, but not limited to, citizens, permanent residents, refugees, asylees, and those granted lawful temporary status—unless required or explicitly permitted by law." Furthermore, if an employer decides to hire someone regardless of work authorization, the employer cannot exploit, harass, or otherwise discriminate against the employee under NYC's Human Rights Law.

In its recently issued guidance, the NYCCHR opines that use of the term "illegal alien," when used with intent to demean, humiliate, or harass a person, is illegal under the law.

Further, harassing or discriminating against someone for their use of another language or their limited English proficiency, and threatening to call ICE on a person based on a discriminatory motive, are considered to be in violation of the law. Paying a lower wage or withholding wages to workers because of their immigration status also is unlawful. Fines

of up to $250,000 can be assessed for each act of willful discrimination, and damages are available to complainants.

As a reminder, it is illegal in New York City to discriminate against employees, interns, job seekers, and independent contractors on the basis of actual or perceived: age, race, skin color, religion/creed, sex/gender, gender identity or expression, disability, national origin, immigration status, caregiver status, marital or partnership status, familial status, military service, veteran status, pregnancy, childbirth and related medical conditions, salary history, sexual and reproductive health decisions, sexual orientation, predisposing genetic characteristics, status as victim of domestic violence, sexual violence, or stalking, arrest or conviction record, credit history, and unemployment status.

What Should Employers Do?

Review and update EEO and other relevant employment policies in handbooks and hiring materials. Train employees and managers on the recent NYC guidance.

6. *Effective November 18, 2019*: *NYS Requires Reasonable Accommodation of Domestic Violence Victims and NYC Prohibits Retaliation for Seeking Reasonable Accommodations*

New York State Human Rights Law ("NYSHRL") requires employers to provide reasonable accommodations to victim of domestic violence, sex offenses and stalking. This NYSHRL amendment follows similar protections under New York City's Human Rights Law. The NYSHRL amendment also expands the definition of "victim of domestic violence" to make it consistent with New York's Domestic Violence Prevention Act.[1] And ***effective November 11, 2019***, the New York City Human Rights Law prohibits retaliation for seeking a reasonable accommodation for reasons protected under NYC Human Rights Law (like disability, religion, pregnancy, childbirth and related medical conditions, domestic violence victims, lactation, etc.).

What Should Employers Do Now? Update employee policies and train managers on their expanded obligations to reasonably accommodate domestic violence victims and to ensure no retaliation against individuals for requesting reasonable accommodations.

7. *Effective December 31, 2019: Minimum Wage Increase and Elimination of Tip Credit for Non-Hospitality Jobs*

As you know, New York's minimum wage and salary threshold increases took effect on December 31, 2019 for those organizations in New York covered by one of New York's Minimum Wage orders. Effective December 31, 2019, the tip credit for employees covered by New York's Miscellaneous Wage Order (such as nail salon workers, hairdressers, aestheticians, valet parking attendants, doorpersons and tow truck drivers) will be

1 NY Soc. Serv. L § 459-A.

eliminated (and by June 30, 2020, the tip credit will be reduced by 50%). Elimination of this tip credit will not affect employees covered by the Hospitality Industry Wage Order.

On the topic of wages, New York employers should be mindful of a decision in 2019 where an appellate court determined that an employee may sue his/her employer for paying wages late and get liquidated damages of 100%, even though the wages were paid! In *Vega v. CM and Associates Construction Management, LLC*, 175 A.D.3d 1144 (1st Dept. 2019), the employee, a manual worker, argued that the payment of wages on a bi-weekly basis instead of weekly as New York's Labor Law requires for manual workers, was an unlawful "underpayment" and that the law provides a private right of action where the frequency of pay provision is violated. The court agreed.

What Should Employers Do Now? Review your pay practices to ensure you have updated pay to meet salary threshold updates for exempt administrative and executive employees. Until and unless New York's highest court reverses the *Vega* decision, employers should ensure they are meeting all pay frequency requirements for *each category* of employee, and paying workers on time as required. Remember that New York has a six-year statute of limitations for an employee or former employee to bring an unpaid or "underpaid" wage claim.

8. *Effective January 1, 2020: Non-Disclosure Provision Protections Take Effect*

Agreements to settle employment discrimination claims entered into on or after January 1, 2020 by employers within New York State, containing non-disclosure provisions will be void if they prevent the disclosure of factual information related to any future claim of discrimination ***unless*** the employee or potential employee is notified in writing that such non-disclosure does not prohibit speaking with their attorney, law enforcement, or other government agency like the EEOC or the New York State Division of Human Rights. Any employee entering into a non-disclosure provision in connection with such an agreement must sign a separate document, giving that employee 21 days to consider whether to sign the non-disclosure agreement and 7 days to revoke their acceptance of it.

9. *Effective January 1, 2020: NY Paid Family Leave Increases*

In 2020, eligible employees will be entitled to up to 10 weeks of leave at 60% of their average weekly wage (AWW), up to the State maximum AWW of $1,401.17, making the maximum PFL benefit $840.70 per week.

10. *Effective January 6, 2020: NYS Salary History Ban*

New York State's Labor Law now bans all employers in New York from inquiring about a job candidate's or current employee's salary or wage history as a condition of employment, a condition to receive an interview, a condition of an offer of employment, or a condition for continued employment or promotion. This change follows New York City's lead which already maintains a salary history ban. In addition, employers are prohibited from relying on salary or wage history in determining whether to offer employment or in determining

what wages or salary to offer an applicant. The law also prohibits retaliation against an individual for refusing to provide wage or salary information. But the law does not preclude a job candidate from volunteering their salary history information, stating salary expectations, or an employer from confirming salary history after making a job offer. This ban would not affect laws that otherwise require the disclosure or verification of salary history information. For nonprofit employers, notably, the law does not in any way impact federal law requiring disclosure of salaries of officers, directors and certain highly compensated employees Form 990. However, the law prohibits employers from searching publicly available information to determine salary history of a prospective employee. New Jersey has also passed a salary history ban.

11. *Effective January 7, 2020: Employers to Provide Notice of Rights and Remedies on Employee Reproductive Health Decisions*

On *November 8, 2019*, an amendment to New York State's Labor Law (NYLL)--Section 203-E--took effect, prohibiting all employers within New York State from discriminating or retaliating against employees or their dependents based on their reproductive health decision-making. Specifically, under New York State's Labor Law Section 203-E, an employer may not access employee personal information regarding the employee's or the employee's dependent's reproductive health decision making, including but not limited to, the decision to use or access a particular drug, device or medical service without the employee's prior informed affirmative written consent.

Effective January 7, 2020, pursuant to NYLL Section 203-E, employers of all sizes within New York State must notify employees of their rights under the law and remedies. For those employers with an employee handbook, the notice of rights and remedies must be contained in that handbook. The NYS Department of Labor has not issued any guidance yet, including whether independent contractors are encompassed by this law as "employees" and whether they must receive written notice of rights as well. Employees may sue in court for violation of the law. Violation of the law can result in damages, including, but not limited to, back pay, benefits and reasonable attorneys' fees and costs for a prevailing plaintiff, injunctive relief against an employer, reinstatement; and/or 100% liquidated damages of the award for damages unless an employer proves a good faith basis to believe that its actions were in compliance with the law. The law also contains civil penalties against employers that retaliate against an employee for complaining of a violation of this law. The New York State Labor Law amendment does not exempt religious or faith-based organizations (see below for further information). It also does not define "employee" and so it is unclear whether the mandated employee notice must also be provided to an entity's independent contractors who are now covered by NYSHRL antidiscrimination provisions.

The justification for the law is that the federal Affordable Care Act (ACA) recently required that health insurance plans cover FDA-approved birth control methods without out-of-pocket costs to employees. Some for-profit employers have attempted to prevent

employees from accessing health insurance plan coverage of FDA-approved birth control without out-of-pocket costs on the grounds that this health insurance benefit conflicts with an employer's personal beliefs. As a result, over 100 federal lawsuits have been filed by employers to deny employees this benefit, including employers operating in New York State. New York State's legislature seeks to ensure that employees' decisions about pregnancy, contraception, and reproductive health are protected under state law from employment discrimination.

This amendment to New York State's Labor Law prevents an employer from discriminating against employees based on reproductive health decisions, regardless of how the employer became aware of those decisions. Despite medical confidentiality protections under The Health Insurance Portability and Accountability Act (HIPAA), an employer does receive health insurance utilization summaries, which are distributed to each employer on a regular basis. In these reports, in some cases, an individual's identity may be deduced by an employer based on the nature of the service and composition of the insured class reported in the summaries, and the State does not want employers using information about an employee's reproductive health decision as a basis for discriminating against an employee or taking a negative employment action against them.

The State Labor Law amendment follows a recent amendment to New York City's own Human Rights Law, which prohibits employers with four or more employees in New York City, labor organizations or employment agencies, from discriminating against or harassing job applicants, employees, interns, and independent contractors without employees, based on their sexual and reproductive health decisions. [2]

Note to religious/faith-based nonprofit organizations: The State Labor Law and New York City Human Rights Law amendments are currently being challenged in federal court in New York by Evergreen Association, Inc., a nonprofit that operates pregnancy centers, and its founder and President, Chris Slattery, on the grounds that the law violates their constitutional rights to freedom of speech, freedom of association and due process, and that the term "reproductive health decision-making" is undefined, making that law unconstitutionally vague. Stay tuned for developments in this litigation as there is no exemption for religious or faith-based organizations under the New York State Labor Law. While New York State and New York City Human Rights Laws do contain religious

2 New York City's Human Rights Law defines "sexual and reproductive health decision" as "any decision by an individual to receive services, which are arranged for or offered or provided to individuals relating to sexual and reproductive health, including the reproductive system and its functions." Services include, but are not limited to:

- Fertility-related medical procedures;
- Sexually transmitted disease prevention, testing, and treatment; and
- Family planning services and counseling, such as birth control drugs and supplies, emergency contraception, sterilization procedures, pregnancy testing, and abortion.

organization exemptions from those laws (though NYCHRL does not define a "religious organization"), those exemptions are nonetheless limited in their scope.[3] Religious organizations, in particular, should consider the impact of the amendment to New York State's Labor Law and consult with their legal counsel about their rights and obligations.

What Should an Employer Do Now? Provide a written notice of employee rights and remedies as required and review and update all EEO and other policies prohibiting discrimination and employment-related hiring materials.

12. *Effective January 11, 2020: Expansion of NYC Human Rights Law to Include Independent Contractor*

NYCHRL now includes "independent contractors" in the definition of employees protected against workplace discrimination and retaliation just as NYSHRL prohibits discrimination against non-employees. This means that entities engaging independent contractors will, for example, need to provide reasonable accommodations for all of the reasons they must be provided to employees (disability, religious practices, pregnancy, status as a domestic violence victim, lactation room, etc.) and may not inquire about criminal convictions until after an "offer" is extended, or inquire about "salary history" or credit history. No guidance has been issued to date by NYCHRL nor a definition of "independent contractor" provided.

What Should Employers Do? Entities engaging independent contractors should be reviewing their vendor and contractor agreements and updating/modifying them to include appropriate protections to minimize legal risk. They should also be ensuring that independent contractors are provided with applicable employee anti-discrimination and reasonable accommodation policies and EEO training given to employees and that vendors are also providing adequate training for their own employees. Also speak with your legal counsel before making decisions about engaging contractors or terminating or not renewing their agreements.

13. *Effective February 8, 2020: NYSHRL Employer Coverage Expanded*

NYSHRL will apply to ***all*** employers within New York State, regardless of size. Previously, the law only covered employers with **4 or more** employees (except in the case of sexual harassment where employers of all sizes were covered). Oddly, New York City's Human Rights Law still applies only to employers with four or more employees. Under NYCHRL, for purposes of determining the number of employees, the law includes: (i) interns, freelancers and independent contractors; and (ii) the employer's parent, spouse, domestic partner or child, if employed by the employer.

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3 NYC's Human Rights Law does not prohibit religious organizations from limiting employment or giving preference to persons of the same religion or denomination or from making such selection as is calculated by such organization to promote the religious principles for which it is established or maintained.

14. *Effective March 21, 2020: Employers Must Implement Protections for Data Privacy/Proper Disposal of Private Information*

Any person or business that owns or licenses computerized data which includes **private information**[4] of a New York resident must "develop, implement and maintain reasonable safeguards to protect the security, confidentiality and integrity of the private information including, but not limited to, disposal of data." The law sets out the specific steps that a business/employer must take to be legally compliant.

You may recall that The Stop Hacks and Improve Electronic Data Security Act ("NY SHIELD Act") took effect on October 23, 2019. The NY SHIELD Act requires employers to notify New York residents of a data security breach. Read more about the Act.

Take-Away: What Should Employers Do Now?

- Employers—even those based outside New York State--handling any private information of a *New York resident—which would include an organization's New York employees*-- must develop policies and protocols and train employees who handle such sensitive information on how to safeguard it in compliance with the law's requirements and handling data breach notifications. One example would be developing policies and protocols for employees working with credit card information on the proper handling of that information and what to do in the event of a breach. Conduct employee training, including cybersecurity training.
- Employers should ensure that any third-party providers or vendors are complying with the SHIELD ACT's requirements for both data breach security and notification. This would include requiring those providers and vendors to give the employing

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[4] Under the applicable law, "Personal information" means any information concerning a natural person which, because of name, number, personal mark, or other identifier, can be used to identify such natural person;

(b) "Private information" means either: (i) personal information consisting of any information in combination with any one or more of the following data elements, when either the data element or the combination of personal information plus the data element is not encrypted, or is encrypted with an encryption key that has also been accessed or acquired:

(1) social security number;
(2) driver's license number or non-driver identification card number;
(3) account number, credit or debit card number, in combination with any required security code, access code, password or other information that would permit access to an individual's financial account;
(4) account number, credit or debit card number, if circumstances exist wherein such number could be used to access an individual's financial account without additional identifying information, security code, access code, or password; or
(5) biometric information, meaning data generated by electronic measurements of an individual's unique physical characteristics, such as a fingerprint, voice print, retina or iris image, or other unique physical representation or digital representation of biometric data which are used to authenticate or ascertain the individual's identity; or
(ii) a user name or e-mail address in combination with a password or security question and answer that would permit access to an online account.

organization written proof of compliance and an agreement to indemnify in the event of the vendor's failure to comply with the SHIELD ACT's requirements as it pertains to the employing organization's data.

- Ensure cybersecurity insurance will adequately protect your organization in the event of a breach—regardless of whether the breach is by your organization or a third-party that accesses, uses or stores your data. At a minimum, the insurance should cover the costs associated with any breach, including, but not limited to, the costs of the data security breach notification, related costs (including attorneys' fees and public relations costs in connection with reputational damage), actual losses as a result of a data security breach or failure to notify, and any claims against your organization by a third party (like donors).

Although there is currently no private right of action under this law for those whose private information has been compromised as a result of a violation, the New York State Attorney General has the right to bring an action in court, seeking damages, including actual costs or losses and consequential financial losses, incurred by a person entitled to notice of a data breach. A court may also impose a civil penalty of the greater of $5000 or up to $20 per instance of failed notification, up to a maximum of $250,000.

Separate from NY's SHIELD ACT, many employers in New York should be alert to a requirement under New York's Labor Law (Section 203-d) to protect their own employees' personal identifying information like social security numbers. Employers would be well-advised to implement or update policies and procedures to address these legal developments as well to protect their own employees' personal information since failure to do so may result in civil penalties.

15. *Effective May 10, 2020: No Pre-Employment Testing for Weed*

New York City employers, labor organizations and employment agencies, will be prohibited from conducting pre-employment drug testing for marijuana or THC, with some exceptions for safety and security-sensitive jobs and those tied to a federal or State contract or grant.

What Should an Employer Do Now? Review and update all drug policies and employment-related hiring materials like employment applications and offer letters to ensure compliance with the law.

16. *Effective August 12, 2020: Statute of Limitations on Sexual Harassment Claims Under State Law Extended*

The statute of limitations to file a sexual harassment complaint with the New York State Division of Human Rights is expanded to three years (from one year) for claims arising on or after August 12, 2020.

What Should an Employer Do Now? Ensure that any annual training of employees and independent contractors includes training on preventing all types of unlawful discrimination, harassment, and retaliation (*not just sexual harassment*), and that managers

and staff are crystal clear about what type of conduct by or against employees and independent contractors violates the organization's policy.

If you have any questions or seek assistance with updating your policies, conducting employee training, and advising on compliance, please contact Lisa M. Brauner, Esq., Perlman & Perlman LLP, Employment Law Department, lisa@perlmanandperlman.com, 212-889-0575.

The information provided in this document does not constitute legal advice, and is not intended to substitute for legal counsel.